IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1153

D. LOUIS ABOOD, ET AL., *Appellants,*

v.

DETROIT BOARD OF EDUCATION, ET AL., *Appellees.*

CHRISTINE WARCZAK, ET AL., *Appellants,*

v.

DETROIT BOARD OF EDUCATION, ET AL., *Appellees.*

On Appeal from the Michigan Court of Appeals

BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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This brief, Amicus Curiae, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The NEA is an independent, voluntary organization open to persons who are actively engaged in the profession of teaching or other educational work and to all other persons interested in advancing the cause of education. It presently has more than one million, eight hundred thousand members employed in public school systems throughout the United States, including more than 90,000 in Michigan.

A primary objective of NEA and its state and local affiliates is to effectuate improvements in the terms and conditions of employment of teachers, and each of these organizations is committed to the view that this can be done most effectively when employees are organized to deal collectively with their employers. When an organization has been chosen by the majority of employees in a bargaining unit to represent all members of the unit in dealings with their employer regarding terms and conditions of employment, we believe that the costs of such representation, and of policing the collective agreement, should be borne by all employees without regard to membership in the organization which has secured such improvements.

Where permitted by state law, many NEA affiliates have negotiated various types of union security provisions, including agency shop. In at least two states where NEA affiliates bargain as majority representatives, agency shop fees are mandated by state law.

In Michigan, many NEA affiliates engage in collective bargaining with school boards and have negotiated agency shop provisions pursuant to the Michigan Public Employment Relations Act. Although the Detroit Federation of Teachers, which negotiated the

agency shop agreement in issue here, is not an affiliate of NEA, on behalf of the NEA members in Michigan as well as the NEA members in other states which sanction the negotiation of union security provisions, we support the constitutionality of the Michigan statute and the challenged agency shop arrangement.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether a state, pursuant to an overall labor relations structure patterned after the national labor laws, may constitutionally authorize, in the public sector, the negotiation of the same type of union security agreements which have been negotiated with congressional encouragment and support in the private sector—agreements which constitute an important element of the national labor policy embodied in the Railway Labor Act and the National Labor Relations Act, and which have been upheld by this Court for a generation.

I.

Congress, by authorizing the negotiation of union security provisions in the private sector, sought to encourage basic fairness among employees in the bargaining unit. Congress felt that employees whose bargaining agent negotiated collective agreements, policed such agreements, and processed grievances under them for all members of the bargaining unit—members and nonmembers alike—should share equally in the cost of such services just as a voter who voted for the losing party must nevertheless pay taxes for the government services in which he shares. By authorizing the elimination of "free riders," Congress also sought to encourage labor peace and stability. Moreover, this Court

and other courts have recognized that to strike down such union security provisions would undermine the basic congressional policy calling for effective collective bargaining by depriving the exclusive representative of the necessary resources to adequately negotiate, police, and administer the collective agreement.

Although union shop and agency shop arrangements in private employment have been held by this Court to be imbued with the requisite governmental action to bring the requirements of the First Amendment into play, the Court has repeatedly held that such arrangements do not *per se* violate the First Amendment rights of employees who are required to contribute financial support to the bargaining agent.

Such union shop and agency shop arrangements do not violate freedom of association since employees from whom fees are exacted are not required to associate with anyone. Nor does such a requirement on its face infringe upon freedom of expression, since the requirement does not obligate employees to subscribe to any particular doctrine.

If a union shop or agency shop provision, insofar as it requires all employees in the bargaining unit to contribute to the cost of bargaining, policing and administering the collective agreement, infringes at all upon First Amendment rights, the infringement is marginal and outweighed by the important and substantial interests of Congress in insuring basic equity, labor peace and stability, and effective collective bargaining.

A different result might be reached if the exaction of fees were to be used to support political causes to which the employee is opposed. This Court has construed the Railway Labor Act as not permitting such

expenditures and has identified appropriate remedies for those objecting to such use. Nevertheless, the Court has consistently upheld the constitutionality of the basic union security provisions themselves.

In managing its own internal affairs, Michigan has adopted a labor relations structure which parallels the structure established by Congress for the private sector and which was motivated by similar considerations. Because of this comparability, the Michigan agency shop arrangement raises no unique constitutional issues and the private sector precedents are controlling.

Appellants argue that there can be no compelling state interest here because most states do not authorize agency shop arrangements in the public sector. Agency shop, however, is an integral part of the statutory scheme that Michigan has developed to deal with public employment labor relations. Michigan concluded that in order to achieve labor stability and effectively deliver governmental services, it should establish a system of collective bargaining and exclusive recognition, impose a duty of fair representation, and, to offset the resulting costs, authorize the parties at the bargaining table to negotiate agency shop provisions. The constitutionality of the Michigan scheme cannot be made to depend upon whether a nose count of its sister states, many with entirely different labor relations structures, currently approve of its action.

Appellants also argue that Michigan cannot have a compelling interest because it, like Congress, leaves the decision whether to negotiate a union security agreement to the parties. But the states, like Congress, must make many compromises of both a policy and political nature in enacting labor relations statutes.

Its accommodation to local realities on the agency shop question was one of those compromises, and the wisdom of that compromise is a "question of . . . policy with which the judiciary has no concern." *Railway Employees' Department* v. *Hanson,* 351 U.S. 225, 234 (1956).

In *Hanson,* this Court sustained a union security provision negotiated pursuant to the Railway Labor Act. The appellants argue that because *Hanson* involved private parties, there was no "state action" and no need to put the issue of union security to the litmus test of the Constitution, and, hence, *Hanson* is not controlling. But this Court clearly and unanimously found that there *was* sufficient governmental action to trigger constitutional limitations, and proceeded to uphold the validity of the challenged union security arrangement.

Appellants further argue that public employee unions are more "political" than private sector unions. Insofar as appellants contend that the bargaining table functions of a public employee union are "political" because government is the employer, the argument lacks merit. The "political" expenditures which this Court deemed unauthorized by Congress have been specifically distinguished by this Court from expenditures germane to collective bargaining. Moreover, the "political" expenditures which have caused concern to some members of this Court have been expenditures going to matters of conscience and belief and the political electoral process. Compelled financing of the collective bargaining activities of a public employee union does not interfere with the "conscience and beliefs" of the employees it represents any more than does the exaction of fees to support the bargaining activities of a private sector union. To the extent that appellants argue that public employee unions are "political" because they deal extensively with government in contexts other than collective bargaining, their argument fails because such activities do not differ significantly from the activities of unions in the private sector where union security arrangements have been upheld by this Court.

II.

In ruling that unions may not spend exacted agency shop monies for "political" causes over the objections of dissenting employees, the Michigan Court of Appeals in effect severed the application of the statute which it found to be unconstitutional from its constitutional aspect of providing financing for collective bargaining activities. Determinations as to the severability of state statutes are matters of state law for the courts of the state, and accordingly the Michigan Court of Appeals' action is conclusive upon this Court. The decision of the court below provided appellants with effective relief by declaring that fees exacted from appellants could not be used for "political" causes over their objection.

ARGUMENT

I. THE CHALLENGED AGENCY SHOP ARRANGEMENT DOES NOT VIOLATE APPELLANTS' FIRST AMENDMENT RIGHTS.

A. Although Union Shop and Agency Shop Arrangements In Private Employment Are Imbued With The Requisite "State Action" To Trigger Constitutional Limitations, They Do Not Violate First Amendment Rights.

1. SUCH UNION SECURITY ARRANGEMENTS CONSTITUTE AN IMPORTANT ELEMENT OF NATIONAL LABOR POLICY.

In the early nineteen-thirties, Congress sought to minimize labor unrest in order to insure the unim-

peded flow of commerce. It was the judgment of Congress that this goal could be realized most effectively if it guaranteed that employees would have the right to organize into unions and to bargain collectively with their employers. Accordingly, in 1934, Congress substantially amended the Railway Labor Act, 45 U.S.C. 151, and in 1935 enacted the National Labor Relations Act, 29 U.S.C. 151. In both of these measures Congress provided that the labor organization which was to function as the bargaining representative for a unit of employees was to be elected by majority vote of all of the employees in that unit and that once such a selection was made, the union's representative role was to be exclusive.[1] In rejecting notions of plural or proportional representation in favor of the majoritarian principle, Congress undoubtedly was influenced by political analogies. See *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.") *Accord, NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[2]

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[1] See Weyand, "Majority Rule in Collective Bargaining," 45 *Colum. L. Rev.* 556 (1945).

[2] Congressional policy was prefigured by the testimony of Joseph Eastman, Federal Coordinator of Transportation, speaking in support of the majority rule provisions in the 1934 amendments to the Railway Labor Act:

> "I think that is the principle that we follow throughout this country in all of our government activities. If a majority of the people, even a plurality, select Congress, that is the kind of Congress they get and that sits until the next election, when those in the minority have a chance to convert the others to their way of thinking. The same with labor unions." Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2d Sess. at 33-34 (1934).

This Court has repeatedly recognized the validity of the principle of exclusive representation. See, *e.g.*, *NLRB* v. *Allis-Chalmers Mfg. Co., supra; Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944); *J. I. Case* v. *NLRB*, 321 U.S 332 (1944.); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Virginia Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937). Only recently the Court refused to permit an exception to the principle of exclusive representation even where elimination of racial discrimination—a matter of "highest priority"—was involved. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 66 (1975). Holding that the protection given concerted activities by Section 7 of the National Labor Relations Act did not extend to two employees who tried to pressure their employer to bargain with them rather than the majority representative about problems of racial discrimination, the Court in *Emporium Capwell* indicated that such bargaining would endanger the interests of both the employees and the employer, and that an employer could have "strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination." 420 U.S. at 70. The Court explained its rationale as follows:

> "An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each group's demands . . . could only set one group against the other even if it is not the employer's intention to divide and overcome them. . . . With each group able to

enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock, is high. . . .'' *Id.* at 67-68.

With exclusive authority conferred upon the majority union to represent all employees in the unit, its members and nonmembers alike, comes the correlative obligation fairly to represent them all. Although not specifically articulated by Congress, the Court found such an obligation to be implicit in the national labor policy, both with respect to negotiations with the employer, *Syres* v. *Oil Workers International Union,* 350 U.S. 892 (1955); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953); *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944); *Steele* v. *Louisville & N.R. Co., supra;* and the administration of the collective bargaining agreement, *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Humphrey* v. *Moore,* 375 U.S. 335 (1964). In announcing the doctrine, this Court referred to the political model. After considering the collective bargaining system which Congress had chosen to promote industrial stability in the railroad industry, the Court concluded:

> ''[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom its legislates.'' *Steel* v. *Louisville & N.R. Co.,* 323 U.S. 192, 202 (1944).[3]

[3] As this Court emphasized in *Emporium Capwell, supra,* at 64, Congress sought to accommodate the interests of minority employees in other ways: by assuring that they are in a ''unit appropriate for the purposes of collective bargaining'' with sufficient commonality of interests with their fellow unit members to avoid distinctively differing employment concerns; by guaranteeing through the Landrum-Griffin Act amendments of 1959, that minority voices within unions have a fair chance to be heard and to influence the thinking of the group; and by entitling individual employees to ''present grievances to their employer'' under Section 9(a) of the NLRA, 29 U.S.C. 159(a).

Collective bargaining, especially in its contemporary dimensions, is time consuming and costly. It requires bargaining agents or their parent organizations to maintain research departments, hire legal and other experts, amass economic information and formulate and document positions which can both satisfy their constituency and be reasonably persuasive to employers at the bargaining table. The policing of collective bargaining agreements after they have been negotiated and the processing of grievances under them also involves considerable time and expense, and, by virtue of the duty of fair representation, the exclusive representative must process grievances on behalf of all members of the bargaining unit, its members and nonmembers alike.

Mindful of the costs involved in negotiating and administering collective agreements, Congress expressly authorized parties at the bargaining table to require that those who reap the benefit of a union's representation contribute to its cost. Thus, both the National Labor Relations Act and the Railway Labor Act, as amended, allow employers and exclusive representatives to agree that as a condition of continued employment, all employees in the unit must become members of the union within a specified period after their hiring. See 29 U.S.C. 158(a)(3); 45 U.S.C. 152, Eleventh. This express authorization for the union

shop has been held to cover union security arrangements which, while requiring all employees in the unit to contribute to the cost of negotiating and administering collective agreements, do not require actual membership in the union. *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963).[4]

Members of both Houses of Congress articulated their belief that the amendments to the Railway Labor Act would provide basic fairness among employees in the bargaining unit. Senator Hill was a member of the Committee on Labor and Public Welfare who, along with Senator Taft, drafted the amendments to S. 3295, which ultimately became the law. After these amendments, the bill received the unanimous recommendation of the Committee. Senator Hill said during the debates:

> "There can be an honest disagreement as to whether individuals favor labor unions. The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." 96 CONG. REC. 16279.

Similarly, Representative Wolverton, a member and former chairman of the House Committee on Interstate and Foreign Commerce, which had recommended support of an almost identical House bill, said in urging passage of S. 3295:

> "One of the compelling reasons that in my opinion justifies the union-shop provision grows out of the fact that under the act whatever benefits result from the collective bargaining of the employees' representatives is shared by all employees of the particular craft or class. The representative therefore actually represents all the employees of such craft or class whether they be members or not of the union. To me it seems simple justice to expect, and, if necessary, require all employees who stand to benefit from the collective bargaining to belong to the union that acts for them, and in their behalf. Otherwise, employees who did not belong to the union share equally with those who do belong, the same benefits, and without assuming any of the responsibilities incident to membership. The mere statement of this fact seems to me to present an unanswerable argument in favor of what this bill seeks to do." 96 CONG. REC. 17050.

Drawing upon the political analogy, Congress recognized that just as all who benefit from the services provided by government should help defray the cost regardless of whether they voted for the party in power, comparable equitable principles justified a provision insuring that all who benefit from the services of a union chosen as the bargaining representative by a majority should contribute to the expense—in short, that in a system of industrial democracy, as in a political democracy, there should be no representation without taxation. For example, Senator Lehman, a member of the subcommittee which considered the amendments to the Railway Labor Act authorizing union security, responded to a witness during Senate hearings in this way:

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[4] The Railway Labor Act authorizes such agreements notwithstanding "any other statute or law of . . . any state." 45 U.S.C. 152, Eleventh. The National Labor Relations Act, however, does not authorize "the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or Territorial law." 29 U.S.C. 164(b). This provision has been held to encompass agency shop agreements as well as union shop agreements. *Retail Clerks International Association* v. *Schermerhorn*, 373 U.S. 746 (1963).

"But there is no doubt that while no man is compelled to join a political party, all citizens have equal duties in order to enjoy the benefits of citizenship.

"Every man, whether he is a Democrat, a Republican, or some other party, has to pay taxes; he has to do jury duty, he has to bear arms in defense of his country.

. . . .

"He has got these various obligations or else he does not obtain or is not entitled to the benefits that come from citizenship.

"Now, the men working on the railroad who do not belong to the brotherhoods or to the unions, they do share in all the benefits without accepting any of the responsibilities so far as I can see." *Hearings on S. 3295 before the Subcommittee on Railway Labor Act Amendments of the Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess.,* at 169-70.

Representative Linehan, a member of the House Committee which had given considerable time and attention to bills providing for union security, stated in debate:

> "'Free riders'—those who seek to get something for nothing are resented in every walk of life, and justly so. We all believe no man should shirk his responsibility. None among us will deny that all who benefit from the services provided by organized society, through government, should help pay the cost of government. Why should not the same principle apply to workers who secure the benefits of trade unionism?"
>
> . . . .
>
> "This measure is the very essence of democracy." 96 CONG. REC. 17058

Congress also believed that union security provisions would enhance labor stability. Representative Linehan went on to say during the debate:

> "This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst—the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved.
>
> "Such a situation creates friction. It makes for hard feelings. It lowers morale. It affects output and productivity. Under the union shop, workers will be pulling together. Each man will be bearing his proper share of the load. This should undoubtedly result in improved productivity and greater harmony which will be equally beneficial to the employees, the management, and the public." 96 *Cong. Rec.* 17058.

Moreover, as this Court has recognized in a case arising under the Railway Labor Act, such union security agreements promote "the basic Congressional policy" calling "for self-adjustments between effective carrier organizations and *effective* labor organizations." *International Association of Machinists* v. *Street,* 367 U.S. 740, 772 (1961) (emphasis added). The purpose of these union security arrangements is to "enable . . . [collective bargaining] agents to fulfill their statutory responsibility to represent all the employees while collectively bargaining with the employer . . ." *Buckley* v. *AFTRA,* 496 F.2d 305, 311 (2d Cir.), *cert. denied,* 419 U.S. 1094 (1974). As the Second Circuit noted in *Buckley*:

> "A required tolerance of 'free riders,' *i.e.*, those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden would result not only in flagrant inequity, see *e.g., NLRB* v. *General Motors Corp.,* 373 U.S. 734, 740-743 . . . (1963); *Radio Officers' Union* v. *NLRB,* 347 U.S. 17 . . . (1954), but might also eventually seriously undermine the union's ability to perform its bargaining function." *Id.*

In sum, Congress, by authorizing the negotiation of union security provisions, sought to encourage basic fairness among employees in the bargaining unit and enhance labor peace and stability. This Court and other courts have recognized that to strike down such union security provisions would undermine the basic Congressional policy calling for effective collective bargaining by depriving the exclusive representative of resources adequate to negotiate and administer the collective agreement.

2. SUCH UNION SECURITY ARRANGEMENTS HAVE BEEN CONSISTENTLY HELD NOT, ON THEIR FACE, TO INFRINGE UPON PROTECTED RIGHTS OF ASSOCIATION OR SPEECH.

The validity of union security provisions, including the agency shop, has been established by a consistent line of decisions of this Court, notably *Railway Employees' Department* v. *Hanson,* 351 U.S. 225 (1956); *International Association of Machinists* v. *Street,* 367 U.S. 704 (1961); *Brotherhood of Railway and Steamship Clerks* v. *Allen,* 373 U.S. 113 (1963). With the sanction of these decisions, union shop and agency shop provisions have become commonplace in collective bargaining agreements throughout the country.

In 1956, the constitutionality of a union shop arrangement negotiated pursuant to the Railway Labor Act was challenged in *Railway Employees Department* v. *Hanson,* 351 U.S. 225 (1956). Under the challenged arrangement all employees of the employing railroad, as a condition of their continued employment, were required to become members of the union within a specified time and thereafter maintain that membership. Several covered employees sued in a Nebraska state court, seeking an injunction restraining enforcement of the arrangement on the ground that it violated the "right to work" provision of the Nebraska Constitution. Defendants contended that the arrangement was authorized by § 2, Eleventh, of the Railway Labor Act, as amended, which provided that notwithstanding the law of "any state", a carrier and a labor organization may make an agreement requiring all employees within a stated time to become a member of the labor organization, provided there is no discrimination against any employee and provided that membership is not denied or terminated

> "for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. 152, Eleventh.

The Nebraska trial court issued an injunction and the matter went to the Supreme Court of Nebraska. The latter court concluded that the arrangement violated the plaintiffs' First Amendment rights in that it required them to pay money other than for the cost of union representation. Accordingly, the Nebraska Supreme Court held that there was no valid

federal law to supersede the "right to work" provision of the Nebraska Constitution, and affirmed the decision of the lower court.

Upon review, this Court first considered whether there was sufficient governmental action to trigger constitutional limitations. It answered this question affirmatively:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States. . . .' The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts could not be enforced therein.' 160 Neb. at page 698, 71 N.W.2d at page 547. We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . .' In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed . . . . [footnote omitted]. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction."
>
> "As already noted, the 1951 amendment, permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." § 2, Eleventh [footnote omitted]. A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State." 351 U.S. at 231-32.

The Court then turned to the precise nature of the obligation imposed by the union security arrangement in question. Although the arrangement by its terms mandated "membership" in the union, the Court emphasized that:

> "The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of 'periodic dues, initiation fees, and assessments.' The assessments that may be lawfully imposed do not include 'fines and penalties.' The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of 'fines and penalties' precludes the imposition of financial burdens for disciplinary purposes. If 'assessments' are in fact imposed for purposes not germane to collective bargaining, [footnote omitted] a different problem would be presented." *Id.* at 235.

Having found the requisite governmental action to bring constitutional requirements into play, and having reduced the membership obligation to its "financial core" (See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963)), the Court concluded that the challenged arrangement did not on its face infringe upon plaintiffs' First Amendment rights:

"On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." 351 U.S. at 238.

Five years later, in *Lathrop* v. *Donohue,* 367 U.S. 820 (1961), this Court had occasion to rule upon the constitutionality of Wisconsin's requirement that all lawyers in the state join an integrated bar—the type of requirement to which the *Hanson* court had analogized the union shop arrangement. The integrated bar requirement was challenged as an impermissible infringement on freedom of association and speech. Referring back to *Hanson,* the plurality opinion characterized *Hanson* as holding that the compelled payment of money to an exclusive representative did not involve any infringement on associational rights:

"We there held that 2, Eleventh of the Railway Labor Act, 45 U.S.C. 152, 45 U.S.C.A. 152, subd. 11 Eleventh, did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments." 367 U.S. at 842.

Reaffirming *Hanson,* a majority of this Court in *Lathrop* concluded that the integrated bar requirement did not infringe upon the plaintiff's First Amendment rights. In the plurality opinion four Justices stated that ". . . in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find *any* impingement upon protected rights of association." Id. at 843 (emphasis added). A concurring opinion by Mr. Justice Frankfurter, joined by Mr. Justice Harlan, concluded that *Hanson* was controlling, and thus rejected the argument "that compulsory dues-paying membership in an integrated bar infringed 'freedom of association'. . . ." *Id.* at 850. As in *Hanson,* a majority of the Court also concluded that the requirement to join an integrated bar did not constitute a *per se* infringement on freedom of expression.

Under the *Hanson* decision, as further elaborated by the plurality and concurring opinions in *Lathrop,* neither freedom of association nor freedom of expression are infringed by the mere fact that employees in a bargaining unit are required to pay an amount equal to dues to an exclusive representative in order to support the costs of collective bargaining. The soundness of this conclusion becomes clear when

the true nature of the obligation imposed is examined. A member of the bargaining unit who is required to pay an amount equivalent to dues for services rendered by the exclusive bargaining representative is not compelled to associate with anyone. As the Supreme Court of Wisconsin observed in regard to the analogous integrated bar requirement in *Lathrop*:

> "The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year." 10 Wis. 2d at 432, 102 N.W.2d at 408, quoted in *Lathrop* v. *Donohue,* 367 U.S. 820, 828 (1961).

It is equally clear that the requirement does not on its face infringe upon freedom of expression. As the Fifth Circuit noted in *Gray* v. *Gulf, Mobile & Ohio Railroad Company,* 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971), the employee whose fees are exacted "has never been asked to subscribe to any tenets or doctrines of unionism. He has merely been requested to pay his share of the cost of collective bargaining under the union shop agreement."

We recognize, as did the Court in *Hanson,* that a different result might be reached "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment . . . ." 351 U.S. at 238. In *Internatinal Association of Machinists* v. *Street,* 367 U.S. 740 (1961), a case involving a union shop negotiated pursuant to the Railway Labor

Act, the Court was confronted with the issue left open in *Hanson—i.e.,* whether the power of unions to spend exacted money "is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes." 367 U.S. at 768. The Court answered this question affirmatively, but the decision of the Court based the restriction not on the Constitution but rather on a construction of the Railway Labor Act. See also, *Brotherhood of Railway and Steamship Clerks* v. *Allen,* 373 U.S. 113 (1963). In *Street,* four Justices would have reached the constitutional issue. Justices Douglas and Black concluded that the use of compelled money to support ideological causes and electoral politics violated the First Amendment rights of employees. Justices Frankfurter and Harlan, however, concluded that whatever infringement upon the constitutional rights of employees might be involved in the use of exacted money for political causes was more than outweighed by the interests served by union security provisions.

Once the Court determined in *Street* that exacted fees could not be used to finance the "political causes" of the bargaining agent over the objection of dissenting employees, it sought to identify an appropriate remedy for those who objected to such use.[5] Reaffirming *Hanson's* conclusion that "the union-shop agreement itself is not unlawful," 367 U.S. at 771, the Court concluded that it would not be appropriate to restrain the enforcement of the union shop agreement since this "might well interfere with

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[5] As will be discussed below, the term "political" has many possible meanings. The term is used here only to conform to the language previously used by this Court and not to indicate any acceptance of appellants' overly broad interpretation of the term.

the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." *Id.* at 771. The Court continued:

> "The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining', *Hanson,* 351 U.S. at p. 239, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations." Id. at 772 [footnote omitted].

Consistent with the above, the Court ruled that relief should only be granted to those who have made known to the union their objection to use of their funds for "political causes", and it suggested two possible remedies: (1) an injunction against expenditure by the union for "political causes" of a percentage of each complaining employee's payment equal to the percentage of the union's total budget spent for such causes; or (2) restitution to each complaining employee of a percentage of his payment equal to the percentage of the union's total budget which was expended for political purposes despite communication of his objection to the union. *Id.* at 774-75. See also, *Reid* v. *UAW,* 479 F.2d 517 (10th Cir.), *cert. denied,* 414 U.S. 1076 (1973). In *Brotherhood of Railway & Steamship Clerks* v. *Allen, supra,* the Court further addressed the remedy issue and encouraged the union litigants in that case to adopt internal procedures through which dissenters could obtain relief from the expenditure of exacted funds for "political causes." 373 U.S. at 122-23.

In sum, union security arrangements in the private sector are imbued with sufficient state action to bring constitutional constraints into play, and constitutional problems may exist if such a union were to use exacted fees for "political causes" over the objection of dissenting employees. This Court, however, has held that neither freedom of association nor freedom of speech are infringed by a requirement that all employees in the bargaining unit be required to contribute to the cost of negotiating, policing, and processing grievances under a collective bargaining agreement.

3. Assuming Arguendo That Protected Rights Of Association Or Speech Are Infringed By A Private Sector Union Security Arrangement, Such Infringement Is Justified By A Compelling Governmental Interest.

Since this Court has concluded that union security arrangements in the private sector do not on their face infringe upon First Amendment rights, it has not had occasion to determine whether such arrangements would in any event survive constitutional challenge if subjected to a "compelling governmental interest" test. Several courts of appeals have had occasion to consider this question in cases involving challenges to union security agreements by individuals who claimed that they were required to pay dues to the union contrary to their religious scruples against providing financial support to a union. Although each court ruled that the challenged union security agreement infringed the plaintiff's religious freedom to some extent, each court without exception concluded that the governmental interests involved

were sufficiently important to justify the infringement.

In *Gray* v. *Gulf, Mobile & Ohio Railroad Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), for example, the Fifth Circuit considered whether a union security arrangement negotiated pursuant to the Railway Labor Act violated the First Amendment by requiring a person to pay dues in opposition to his religious beliefs. A unanimous court determined that the arrangement did infringe upon religious freedom, but concluded that "[t]he hand of government is not to be stayed where a compelling government interest outweighs the infringement upon First Amendment rights." 429 F.2d at 1072. The court held that the infringement was justified by the congressional policy "that all who benefit from the collective bargaining activities of a railroad union should help to bear the cost of such activities." *Id.* at 1071.

A similar position was taken by the First Circuit in *Linscott* v. *Miller Falls Company*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), where an employee, discharged for religious refusal to pay fees to a union under a union shop arrangement negotiated pursuant to the National Labor Relations Act, contended that his discharge contravened the First Amendment.[6] The court concluded that the congressional purpose to further peaceful labor relations and to require a fair sharing of the costs of collective bargaining constituted a compelling state interest

[6] Since Section 14(b) of the National Labor Relations Act permits a state to outlaw union security arrangements, the defendants sought to distinguish it from *Gray, supra*, on the ground that there was no "state action." The court rejected this contention.

which warranted the infringement on the plaintiff's free exercise of religion. The Sixth and Ninth Circuits have reached similar conclusions. *Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Papermakers and Paperworkers Union, AFL-CIO*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972). *Accord, Cooper* v. *General Dynamics Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976).

In applying the compelling interest test, the nature and degree of the infringement are relevant variables: the less substantial the infringement, the more likely it is to be justified by the state interest. In *Buckley* v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976), the Court concluded that congressional limitations on campaign contributions infringed upon First Amendment interests. However, because these infringements were only "marginal," the Court had little difficulty in finding a "sufficiently important interest" to sustain them. *Id.* at 635, 638. Congressional restrictions on campaign expenditures, on the other hand, were characterized as "significantly more severe," *id.* at 635, 636, and thus a more substantial governmental interest was required to sustain their constitutionality:

> "The *markedly greater burden* on basic freedoms caused by § 608(e) (1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.* at 647. (Emphasis added)

Thus, in determining whether a union security arrangement unconstitutionally infringes upon the First Amendment rights of one compelled to make payment to a union contrary to his religious beliefs, lower

federal courts have assessed "the degree of interference with the religious practice." *Linscott* v. *Millers Falls Co.,* 440 F.2d at 17; *Yott* v. *North American Rockwell Corp.,* 501 F.2d at 403. The *Linscott* court, in holding that the governmental interests justified the infringement on First Amendment freedom involved in requiring an employee to contribute financial support to a union contrary to his religious beliefs, took account of the fact that the employee's discharge would not result in "absolute destitution" or total exclusion from gainful employment but only a search for employment in a non-union shop.[6a] 440 F.2d at 18. As a result, the Court concluded "that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is the plaintiff who must suffer. We agree with the Fifth Circuit. *Gray* v. *Gulf, Mobile & Ohio Railroad Co." Id. Accord, Yott* v. *North American Rockwell Corp.,* 501 F.2d at 403 (concluding that such burdens constituted "minor infringements on First Amendment rights" that were outweighed by the congressional interests supporting union security); *Cooper* v. *General Dynamics Convair Aerospace Division, supra.*

It is, of course, unnecessary for this Court to decide whether a requirement that an employee contribute financial support to a union contrary to his religious beliefs constitutes only a minor infringement on First Amendment rights, for appellants here do not contend that their religious scruples are offended by the

[6a] Presumably the court intended to refer to a search for employment in a shop without a union security requirement.

service fee. Where no religious freedom is invaded, the infringement—if any—is marginal indeed.

In *Street,* Justices Frankfurter and Harlan, dissenting, characterized as "miniscule" even the claim that the expenditure of exacted fees for political causes violated the plaintiffs' free speech rights, since they were "as free to speak as ever." 367 U.S. at 818. Whatever the merits of this view, the infringement of First Amendment rights—if any—inhering in the expenditure of exacted fees to negotiate a collective agreement mutually benefiting all employees in the bargaining unit and to police the agreement and adjust and process grievances arising under it for all such employees—union members and non-union members alike—is slight at best. Under the majority rule principle, the system of exclusive representation is valid even though a particular bargaining unit employee may find the position of the exclusive representative on a matter involving working conditions personally objectionable. *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975). Accordingly, the requirement that all employees who benefit from the collective bargaining activities of the exclusive representative share in the cost is no more than a mandate for equitable sharing in the implementaton of a valid labor relations scheme. If, contrary to our contention and notwithstanding its own long-established precedents, this Court should perceive some infringement upon First Amendment rights in a private sector union security agreement, the balance is properly struck in favor of the legislative policy—long sanctioned by this Court—assuring equity and labor stability.

B. Private Sector Precedents Sustaining The Constitutionality Of Union Shop And Agency Shop Arrangements Are Controlling Here.

1. THE STRUCTURE AND PURPOSES OF THE MICHIGAN STATUTE AND OTHER STATE STATUTES AUTHORIZING UNION SECURITY AGREEMENTS IN PUBLIC EMPLOYMENT PARALLEL THOSE OF THE NATIONAL LABOR RELATIONS ACT AND THE RAILWAY LABOR ACT.

In managing its own internal affairs, Michigan has enacted a statutory scheme which authorizes public employers and the exclusive bargaining representative of their employees to negotiate agency shop arrangements. As we demonstrate below, this scheme is part of an overall labor relations structure which parallels the labor relations structure established by Congress for the private sector and was motivated by similar considerations. Because of this comparability, the Michigan agency shop arrangement raises no unique constitutional issues and the private sector precedents are controlling.

In 1965, the Michigan legislature adopted the Public Employment Relations Act (PERA).[7] This statute, which was designed to regulate public employer-employee relations in Michigan, was closely modeled after the National Labor Relations Act. Federal decisions under the NLRA have consistently guided the interpretation and application of the PERA. *Rockwell* v. *Crestwood School District,* 393 Mich. 616, 635-36, 227 N.W.2d 736, 744-45 (1975); *Michigan Employment Relations Commission* v. *Detroit Symphony Orchestra, Inc.,* 393 Mich. 116, 127, 223 N.W.2d 283, 289 (1974); *Michigan Employment Relations Commission* v. *Reeths-Puffer School District,* 391 Mich.

[7] M.C.L.A. 423.201 to 423.216.

253, 260, 215 N.W.2d 672, 675 (1974); *Detroit Police Officers Association* v. *Detroit,* 391 Mich. 44, 53, 214 N.W.2d 803, 807-808 (1974).

Like federal law, PERA has been interpreted to contemplate the creation of appropriate bargaining units in which all members have a community of interest and commonality of concerns. *Eastern Michigan University Regents* v. *Eastern Michigan University Professors,* 46 Mich. App. 534, 537, 208 N.W.2d 641, 643 (1973); *City of Warren,* 1966 MERC Lab. Op. 25. Like the NLRB, the Michigan Employment Relations Commission, the administrative agency charged with the responsibility for administering the PERA, has determined the appropriateness of bargaining units when necessary, and has regularly conducted elections to assure fairness and "laboratory conditions" for voters to exercise their free and untrammeled choice of representative. *Willow Run Public Schools,* 1968 MERC Lab.Op. 396, 400; *Harper Woods Public Schools,* 1971 MERC Lab.Op. 658. *Compare Dal-Tex Optical Co.,* 137 NLRB 1782 (1962). When certified by MERC or recognized by the public employer, the labor organization is, pursuant to MCLA 423.211, the "exclusive representative of all the public employees in such unit for purposes of bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." The principle of exclusivity has been repeatedly affirmed. See, *e.g., Mellon* v. *Board of Education,* 22 Mich. App. 218, 220 (1970); *Melvindale-Northern Fitzgerald Board of Education,* 1967 MERC Lab.Op. 1967. *Compare Emporium Capwell* v. *Western Addition Community Organization, supra.*[8]

[8] As of December, 1974, thirty-nine states and the District of

Adopting the standards promulgated by this Court in articulating the national labor policy, the Michigan Employment Relations Commission has imposed upon the exclusive representative the obligation fairly to represent all members of the bargaining unit, irrespective of union membership. *Wayne County Community College,* 1976 MERC Lab.Op. 347; *Local 836, Council 77, AFSCME,* 1976 MERC Lab.Op. 84, 89. *Compare Vaca* v. *Sipes, supra,* and *Humphrey* v. *Moore, supra.*

Following passage of the PERA, Michigan employers and labor organizations began negotiating security provisions of various types. In *Oakland County Sheriff's Department,* 1968 MERC Lab.Op.

Columbia had decided either to allow or require exclusive bargaining for public employees. Government Employees Relations Report, Reference File 51:501 *et seq.* (BNA 1975). Exclusive representation by the majority union in a public sector bargaining unit is designed to achieve the interests recently articulated by this Court in *Emporium Capwell*—the minimization of competing demands which would endanger the interests of both the employees and the employer. 420 U.S. 50 (1975). The federal government initially experimented with recognition of minority unions under Executive Order 10988 (1962), but abandoned it in 1969 in favor of exclusive recognition for the majority representative. Executive Order 11491 (1969). One of the reasons for the change was that government agencies objected to their obligation to deal with minority unions:

> "Agency experience also has been largely on the negative side Federal management officials have found that [minority] recognition is no longer meaningful; that it encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management; and that unions with such recognition lack the strength to contribute substantially to stable labor relations."

Study Committee Report and Recommendations, August 1969, Which Led to the Issuance of Executive Order 11491, at 65, in Labor-Management Relations in the Federal Service (U.S. Federal Labor Relations Council 1975).

1, the Michigan Employment Relations Commission, following federal guidelines, expressly held that employers and unions were expected to bargain in good faith as to terms and conditions of employment in the public service and that among those mandatory bargaining subjects were union security provisions, including the dues check-off and the agency shop. A majority disfavored the union shop. The decision was not appealed and it set the pattern for further negotiations. Following a number of court tests, in *Smigel* v. *Southgate Community Schools,* 70 Lab.Rel.Rep. 2042 (Mich. Cir. Ct. 1970), Circuit Judge Foley declined to issue an injunction against enforcement of the agency shop in a suit brought by dissident teachers. Judge Foley found that the agency shop principle

> "[H]as become an acceptable method of creating stability in public employee-employer relationships, Board of Education of the Schools of the City of Inkster, 263 GERR F-1 (Sept. 23, 1968); Oakland County Sheriff's Department, SLMB Case No. C 66 F-63 (Jan. 8, 1968); 1968 SLMB Labor Opinions 1, 227 GERR F-1 (Jan. 1968); City of Warren Local No. 1383, International Association of Fire Fighters (Macomb Circuit Court No. S 67-33111); Clampitt v. Board of Education of the Warren Consolidated Schools, 256 GERR E-1."

He further observed that the agency shop

> "[H]as been a bargainable issue in the collective bargaining process for many years and has received recognition as having a stabilizing influence upon employer-employee relations. Railway Employees Department v. Hanson, 351 U.S. 225 (1955); NLRB v. General Motors Corporation, 373 U.S. 734; Tremblay v. Berlin Police Union, 232 GERR D-1 (Feb. 19, 1968)." *Id.*

Even though the Michigan statute at the time did not expressly authorize negotiation of union security agreements, Judge Foley did not find the agency shop discriminatory or otherwise inappropriate. On this point his conclusion was reversed. 338 Mich. 531, 202 N.W. 2d 305 (1972). The Michigan legislature promptly adopted a curative amendment authorizing agreements which require all employees in the bargaining unit to pay "to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." M.C.L.A. 423.210. The Michigan legislature —tracking the concerns of Congress in the national labor laws—declared that

> "It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." M.C.L.A. 423.210.

Other state legislatures have reached the same conclusion as the Michigan legislature.[9] And when confronted with constitutional challenges to state statutes

[9] Of the approximately 39 states which expressly authorize public sector bargaining, fifteen have included provisions which authorize or mandate the negotiation of one or more types of union security. The legislature of Massachusetts declared that the purpose of providing for agency shop in Boston was to "assure that all the employees of the city of Boston shall be adequately represented by their . . . exclusive bargaining agents in bargaining collectively on questions of wages, hours, and other conditions of employment." *Mass. Gen. Laws* ch. 335 § 1 (1969); other states authorize negotiation of a service fee so that the employees will pay their "fair share" or will "reimburse" the collective bargaining agent for "services rendered." See *e.g.*, Alaska Stats. 23.40.110b(2); Hawaii Rev. Stats. 89-4; Minn. Stats. Ann. 179.65(2).

which authorize union security, courts in these states have identified basic equity, the promotion of effective representation, and labor stability as the justifying interests.

In Minnesota, for example, a collective agreement may require all public employees who are not members of the exclusive representative to pay a "fair share" fee for services rendered by the representative.[10] The Supreme Court of Minnesota, in concluding that the governmental interest in allowing assessment of a "fair share" fee was sufficiently strong to override an individual employee's interest in obtaining a prior hearing on the amount of the fee imposed, focused upon the dangers involved in the inadequate financing of collective bargaining:

> "The state's reason for allowing appellant to assess a fair share fee is that a union selected as a bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit in a nondiscriminatory manner. Unless the nonmember employees in the unit are compelled to contribute to the costs of union representation, they would enjoy the benefits of the bargaining process while the members of the exclusive representative are forced to assume the

[10] Minn. Stats. Ann. 179.65(2). As amended by Ch. 102, L. 1976, effective March 17, 1976, such a fee may not exceed 85 percent of the regular membership dues.

entire burden of paying for it. In addition, since the members of the exclusive representative may be unable to adequately finance the negotiation and administration of a collective bargaining agreement without such nonmember contributions, the resulting financial instability of the duly elected representative may jeopardize meaningful collective bargaining. [Footnote omitted] See, Buckley v. American Fed. of Television & Radio Artists, 496 F.2d 305 (2nd Cir. 1974), *cert. denied,* 419 U.S. 1093 . . . (1974)." *Robbinsdale Education Assn.* v. *Robbinsdale Federation of Teachers,* 239 N.W.2d 437 (Minn. S.Ct. 1976), *appeal docketed, sub nom., Threlkeld* v. *Robbinsdale Federation of Teachers,* 44 USLW 3677 (U.S. May 7, 1976) (No. 75-1628)

The court further noted:

> "This financial instability might 'encourag[e] the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. This instability also encourages the employer to be obstinate, in hopes of forcing a favorable agreement from a weak union.' Blair, Union Security Agreements in Public Employment, 60 Cornell L.Rev. 183, 189." *Id.* at n. 3.

In Wisconsin, an employer and a union may negotiate an agreement requiring all employees in the bargaining unit to "pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members."[11] Such an agreement carries with it a statutory obligation on the part of the employer to deduct the amount of the union's

[11] See Wis. Stats. 111.70(1)(h), 111.70(3).

dues from each employee's pay. In holding that an employer could not deduct dues for a competing organization, a Wisconsin Circuit Court offered the following rationale for the "fair share" arrangement:

> "The majority bargaining representative of the professional teachers, MTEA, must be given the opportunity to make a concerted and concentrated effort towards resolving labor problems concerning all teachers in the Milwaukee public schools whether or not they are members of the union. This may only be accomplished by the elimination of inter-union competition for dues with the unions that have lost the representation election. It is only just and proper that the majority union may obtain money from nonmembers of the union to cover the cost of negotiations which will benefit all the members of the bargaining unit, regardless of union affiliation. If this were not the case, some teachers would have the best of two worlds—they would not pay a cent to the majority union which represents them at the bargaining table, while reaping the benefits of any negotiations which resulted from the work of the majority union. However, by enacting the provision for 'fair share agreements' the Legislature has resolved the potential for inter-union conflict over dues by requiring all or any of the employees in the collective bargaining unit to pay to the majority union their proportionate share of the cost of the collective bargaining process. This is definitely within the public interest." *Milwaukee Federation of Teachers* v. *WERC,* 92 Lab. Rel. Rep. 2836 at 2841 (Wisc. Cir. Ct., April 12, 1976).

See also, *Town of North Kingston* v. *North Kingston Teachers Association,* 110 R.I. 698, 287 A.2d 342 (1972); *Tremblay* v. *Berlin Police Union,* 108 N.H.

416, 237 A.2d 668 (1968); *Association of Capital Powerhouse Engineers* v. *Division of Bldgs. & Grounds,* 92 Lab. Rel. Rep. 2748 (Wash. Sup. Ct. March 26, 1976); *Oakland County Sheriff's Department,* 1968 MERC Lab. Op. 1.

2. THE CONSIDERATIONS VALIDATING UNION SECURITY ARRANGEMENTS IN THE PRIVATE SECTOR ARE EQUALLY APPLICABLE HERE.

Just as the basic rationale for the Michigan agency shop provision does not differ from the rationale of Congress in authorizing union security provisions, the considerations relevant in assessing the constitutionality of the respective arrangements do not differ in any legally significant sense.

(a) *The Effect On The Constitutional Rights Of Nonmember Employees—If Any—Is Identical.*

First, the effect on the constitutional rights of non-member employees—if any—is identical. The Michigan agency shop arrangement does not require employees to join a union. Rather, it simply requires them to pay "a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative."[12] The extent of an employee's obligation under the Michigan scheme, then, is to render financial support to the bargaining agent. This Court concluded in *Hanson* that such a limited requirement did not impair First Amendment rights. As in the private sector, compelled exaction of a service fee does not bring with it any requirement to associate with union members, to attend

[12] M.C.L.A. 423.210.

union meetings, to vote in union elections, to espouse the cause of unionism. *See Lathrop* v. *Donohue,* 367 U.S. at 828; *Gray* v. *Gulf, Mobile & Ohio Railroad Co.,* 429 F.2d at 1072. And the remedy that would be provided under the decision of the court below to any employee who communicates his objection to the use of his money for political causes—restitution to the employee of that portion of his money expended by the union over his objection—adequately meets, just as this Court's remedy did in *Street,* any constitutional problem that may be involved in such expenditure.[13]

(b) *The State Interest Is As Compelling As The Congressional Interest.*

The Michigan legislature and many other state legislatures have concluded that stability in labor relations involving public employees within the state is essential to provide adequate governmental services and that such stability is enhanced by authorizing the

[13] Appellants suggest that an agency shop arrangement in education differs from an agency shop arrangement in other contexts because the academic freedom of an individual teacher is somehow impaired. It is claimed that as a result of agency shop, even dissenting teachers will ultimately join the union and will "... concede control over their careers to the Union." (Appellants' brief at 158). This will result, it is alleged, in "political and ideological conformity" among the teachers and indoctrination of "impressionable students with the union 'line' on difficult and controversial social issues ...." (Appellants' brief at 163.)

The record, however, contains absolutely no evidence to support these alleged results. When presented with a similar contention in *Hanson,* this Court stated that:

> "[I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U.S. at 238.

negotiation of union security agreements such as the one in issue here. We submit that the interest of a state in managing its own internal affairs is as important and substantial an interest as that of Congress in insuring the free flow of commerce. See *Lathrop* v. *Donohue,* 367 U.S. 820, 879 (1961), where Mr. Justice Douglas, in dissent, observed that in *Hanson* the Court had held:

> ". . . that the evil of those who are 'free riders' may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its own internal affairs by requiring a union-shop agreement would seem to be as great."

The establishment of a system of labor relations which seeks to promote stability in state governmental functions is clearly within a state's power. And the interests of the state served by such a system are sufficiently important to warrant some infringement upon First Amendment rights. In a series of decisions involving public employment, federal and state courts have approved the concept of exclusive representation by the majority union. In response to claims that such exclusive representation impairs the minority union members' First Amendment freedoms, the courts have repeatedly ruled that the government's interests in stable labor relations justified any such infringement. *Connecticut State Federation of Teachers* v. *Board of Education Members,* —— F.2d —— (No. 75-7436, 2d Cir., May 21, 1976); *Memphis Federation of Teachers,*

Local 2032 v. *Board of Education,* 534 F.2d 699 (6th Cir. 1976); *Michigan City (Indiana) Federation of Teachers, Local 399* v. *Michigan City Area Schools,* 499 F.2d 115 (7th Cir. 1974); *Federation of Delaware Teachers* v. *DeLaWarr Board of Education,* 335 F. Supp. 385 (D. Del. 1971); *Local 858 of A.F. of T.* v. *Denver School District No. 1,* 314 F.Supp. 1069 (D. Colo. 1970); *Haukedahl* v. *School District No. 108,* No. 75 C 3641 (N.D. Ill. May 19, 1976); *Edgewood Federation of Teachers Local 3158* v. *Edgewood Independent School District,* Civ. No. SA-74-CA-39 (W.D. Tex. May 7, 1975); *Clark County Classroom Teachers Assn.* v. *Clark County School District,* 532 P.2d 1032 (Nev. S.Ct. 1975); *Bauch* v. *City of New York,* 21 N.Y.2d 599, 237 N.E.2d 211, *cert. denied,* 393 U.S. 834 (1968).

Several decisions have also approved the practice of granting the exclusive representative for a unit of teachers certain privileges such as access to faculty mailboxes and bulletin boards for distribution of union materials, while denying similar privileges to minority unions. *Connecticut State Federation of Teachers* v. *Board of Education Members, supra; Michigan City (Indiana) Federation of Teachers Local 399* v. *Michigan City Area Schools, supra; Federation of Delaware Teachers* v. *DeLaWarr Board of Education, supra; Clark County Classroom Teachers Assn.* v. *Clark County Classroom Teachers Assn.* v. *Clark County School District, supra; Haukedahl* v. *School District No. 108, supra.* In addressing a First Amendment challenge to this practice, a Colorado federal district court identified several specific "salutory" aspects of exclusive privileges and concluded:

> "[A]ll of these benefits resulting from the grant of exclusive privileges to the elected representa-

tive serve the principal policy of insuring labor peace in public schools. Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions.

. . . .

". . . We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interests of the state above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education.

"Thus, we find that the grant of special privileges attacked here satisfies the strictest test for constitutional equal protection. We make this finding although we are not convinced that in fact the classification challenged impairs the exercise of a constitutional right." *Local 858 of A.F. of T.* v. *Denver School District No. 1,* 314 F.Supp. 1069, 1076-77 (D. Colo. 1970).

Michigan, like Congress, has chosen to promote labor stability not only through the adoption of exclusive representation but also through the authorization of agency shop agreements. Michigan's decision to follow the federal model long sanctioned by this Court and profit by the experience under the national labor laws

should weigh heavily on the scales if—contrary to our contention—any constitutional balancing is required.

Appellants argue, however, that

> "[I]f the agency shop were indeed *necessary* to achieve a compelling state interest of some sort in public sector labor relations, we should expect to find it the prevailing rule in most jurisdictions, as well as compulsory rather than (as in Michigan) discretionary with the public employer and union." (Appellant's brief at 128-29).

The argument that there can be no compelling state interest because most states do not authorize agency shop arrangements in the public sector must fail. Agency shop is part and parcel of the statutory scheme Michigan has developed to deal with public employment labor relations. Michigan concluded that in order to achieve labor stability and deliver effective governmental services, it should establish a system of collective bargaining and exclusive recognition, impose a duty of fair representation, and, to offset the resulting costs, authorize the parties at the bargaining table to negotiate agency shop provisions. The constitutionality of the Michigan scheme cannot be made to depend upon whether its sister states currently approve of its action. As this Court has noted, the particular elements contributing to labor peace and stability may be functions of time and place:

> "The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the

judiciary." *Railway Employees' Department* v. *Hanson,* 351 U.S. 225, 234 (1956).

The fact that when Michigan decided to provide a collective bargaining system for public employees the overwhelming majority of the states lacked such a system does not demonstrate that Michigan's decision failed to promote compelling state interests in securing labor stability and promoting effective government services. Nor can it be fairly said that Michigan's subsidiary decision to mandate exclusive recognition failed to promote these basic concerns because other states, at the time of the Michigan decision, had not imposed such a requirement. Surely the constitutional question cannot turn on whether a nose count of the states demonstrates that all or most of the states at a particular point in time have adopted the arrangement in issue. A numerical count of the states in 1960 would have disclosed that only one State—Wisconsin—had established a system of collective bargaining with exclusive recognition in the public sector. Yet, only ten years later, fourteen states had done so.[14] Similarly, in the span of five years, 1969 to 1974, the number of states authorizing agency shop or "fair share" agreements in the public sector jumped from one to thirteen.[15]

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[14] Summary of State Law, Government Employees Relation Report, Reference File 51:503 (BNA 1970).

[15] In 1969, the Massachusetts legislature required the deduction of an "agency service fee" from the wages of employees serviced by exclusive representatives in the City of Boston, and Suffolk County, *Mass. Gen. Laws* Ch. 335, §§ 1-2 (1969). By December 1, 1974, thirteen states and the District of Columbia made provision for agency shop or "fair share" for some or all public employees. Summary of State Law, Government Employees Relations Report, Reference File 51:501 *et seq.* (BNA 1975). Since 1974, California and Connecticut have authorized agency shop in certain units of

Once Michigan decided to provide for exclusive recognition, and the agency administering the PERA decided that this privilege carried with it the duty of fair representation, Michigan determined that its labor relations scheme required adjustment to offset the costs to the exclusive representative in representing all members of the bargaining unit. That decision was Michigan's to make, and its validity cannot turn upon whether other states, many with entirely different labor relations structures—some which do not provide for exclusivity, some which impose no duty of fair representation, and some which maintain "right to work" laws—have authorized negotiation of agency shop agreements.

With respect to the argument that Michigan cannot have a compelling interest because its statute leaves the decision whether to negotiate a union security agreement to the parties, this is precisely what Congress did in both the Railway Labor Act and the National Labor Relations Act. Congress recognized that the need for union security could not be isolated from the history and pattern of collective bargaining in a local area and, therefore, left the decision whether to adopt union security provisions to the employer and union. That structure was sustained by this Court in *Hanson.* Like Congress, the Michigan legislature has accommodated local realities by leaving the decision whether to negotiate an agency shop agreement to the parties involved.[16]

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employees. Cal. Gov't. Code 3546; Conn. Gen. Stat. Ann. 31-105(5). Bills to authorize agency shop are presently pending in many other state legislatures.

[16] *Cf. Linscott* v. *Millers Falls Co., supra,* where the plaintiff contended that because Section 14(b) of the NLRA expressly per-

In adopting its labor relations statute and adjusting it in light of experience, Michigan—like any other state—made many compromises of a policy and political nature. In 1965, it decided to adopt the principle of exclusive recognition and to reject the principle of proportional representation. In 1973, the Michigan Legislature had another choice to make. If it had done nothing in the face of the costs which the bargaining agents were incurring in negotiating agreements as the exclusive representative and in carrying out their duty of fair representation, the state might have jeopardized its entire labor relations structure. At the same time, it might well have foreseen that to mandate agency shop upon unwilling school boards might have created substantial political problems and produced a negative backlash. Michigan, like Congress, compromised by permitting and encouraging, but not requiring, the negotiation of agency shop agreements. The wisdom of that compromise is a "question . . . of policy with which the judiciary has no concern . . .". *Railway Employees' Department* v. *Hanson,* 351 U.S. 225, 234 (1956).

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mitted a state to outlaw the union shop by a "right to work" law, there was no compelling governmental interest which justified the infringement on her First Amendment rights by a union security arrangement requiring her to pay money to a union contrary to her religious beliefs. Rejecting this contention, the First Circuit stated (440 F.2d at 18):

> "In our opinion the fact that Congress chose to share the decision, and to give the final say to the state, does not deny a federal interest in the case at bar, any more than leaving the final word to the parties themselves denied it in *Hanson*. The federal interest attaches if, and when, such action is believed locally to be appropriate as well as in furtherance of the policies behind the LMRA recited in 29 U.S.C. § 151." [footnote omitted].

(c) *The Private Sector Precedents Are Not Distinguishable On "State Action" Grounds.*

Appellants assert that since *Hanson* involved the private sector there was no state action and no need for the Court to put the issue of union security under the litmus test of the Constitution. Thus, appellants claim, the *Hanson* decision cannot be considered as controlling precedent on the issues before the Court in the present case.

Appellants' argument in this regard borders on the frivolous. The question of whether private sector union security arrangements, authorized by federal law, are imbued with such state action as to subject them to constitutional analysis was thoroughly discussed in *Hanson*. This Court agreed with the Supreme Court of Nebraska that the action of Congress in striking down inconsistent "right to work" laws in 17 states was "a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts would not be enforced therein." 351 U.S. at 231-32. It stated that "if private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded"; that "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed"; that a union shop agreement made pursuant to the Railway Labor Act has ". . . the imprimatur of the federal law upon it . . ."; and that "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction." 351 U.S. at 232. Having conclud-

ed that state action was involved, this Court then proceeded to apply constitutional standards and clearly and unanimously upheld the validity of the union security arrangement before it.[17]

[17] Whether or not *Hanson* resolved the "state action" issue in a manner consistent with constitutional doctrine prevailing today is irrelevant with respect to its precedential value in the present case since in *Hanson*, this Court decided the constitutionality of union security clauses on the premise that state action *was* involved. We submit, however, that although there have been constitutional developments in the area of state action since *Hanson*, on the *Hanson* facts the Court would be obliged to reach the same conclusion. In *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345 (1974), this Court was asked to consider whether a practice of a privately owned utility corporation in terminating electric service violated the due process requirements of the Fourteenth Amendment. In analyzing whether there was the requisite governmental action to subject that termination practice to Fourteenth Amendment limitations, the Court found that extensive state regulation of a business does not by itself constitute governmental action. The Court stated:

> "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". 419 U.S. at 351.

In responding to the contention that the state through the Pennsylvania Public Utilities Commission had authorized and approved the termination practice, the Court found that the Commission's approval of the company's practice placed no state "imprimatur" on that policy, since the Commission did not "initiate" or "encourage" the practice. *Id.* at 357 n.17. In the Railway Labor Act, Congress has both "initiated" and "encouraged" union security policy by preempting state laws prohibiting union security agreements. Thus, as this Court concluded in *Hanson*, Congress has placed its "imprimatur" on that policy. 351 U.S. at 231-232.

We submit that this Court would also find today that Congress has placed a federal "imprimatur" on union security arrangements negotiated under the National Labor Relations Act. See *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), *cert. denied* 404 U.S. 872 (1971); *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970); *Hammond* v. *United Papermakers and Paperworkers Union*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *Yott* v. *North American Rockwell Corporation*, 501 F.2d 398 (9th Cir. 1974); *Cooper* v. *General Dynamics Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976). Last term this Court considered a challenge to an agency shop agreement negotiated pursuant to the National Labor Relations Act. *Oil, Chemical & Atomic Workers, Etc.* v. *Mobile Oil Corp.*, —— U.S. ——, 96 S.Ct. 2140 (1976). At issue was whether the Texas right to work law applied to the agreement in view of the fact that the employees' primary job situs was not in Texas but on the high seas. The Court held that:

> "*Federal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws.* It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply. 96 S.Ct. at 2147. (Emphasis added)

Moreover, Congress has provided a federal forum for the enforcement of union security agreements negotiated under the National Labor Relations Act. Labor Management Relations Act § 301(a), 29 U.S.C. 185(a). Such federal sanctions themselves constitute the requisite governmental action to trigger constitutional restraints. *Compare Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178-179 (1972).

(d) *The Activities of Public Employee Unions Are No More "Political" in Any Constitutionally Significant Sense Than Those of Private Sector Unions.*

Appellants argue that whatever the precedential nature of *Hanson* regarding the constitutionality of union security clauses in the private sector, the exaction of money to finance the activities of public sector unions must constitute an *a fortiori* abridgement of First Amendment rights due to the "inherently political" nature of those activities. In essence, appellants contend that the fact that government is the employer in public sector collective bargaining means that the bargaining process itself is "political" and thus no money can be compelled to finance such activities with-

out infringing individual constitutional rights. Additionally, appellants assert that the requirement that public employees pay agency shop fees to their bargaining agent violates their First Amendment right "not to associate with a private politically oriented organization." Appellants' brief at 87.

(1) *The Fact That Public Employee Unions Must Deal With Government As The Employer Does Not Make Their Collective Bargaining Activities "Political" In The Sense Used By This Court In Street and Allen.*

Although appellants concede that the collective bargaining activities of private sector unions can be financed by use of exacted funds, they argue that not even the bargaining table functions of a public sector union can be constitutionally supported by an agency shop arrangement. They reason that coerced monies may not be used for political causes; "all government programs and expenditures take shape in a political matrix"; public sector collective bargaining is designed to influence governmental programs and expenditures; therefore, the very act of collective bargaining is "political" and compelled money may not be used for such purposes. Appellants' brief at 62. The basic question appellants put to this Court, then, is whether the compelled financing of collective bargaining with an employer infringes upon the First Amendment rights of employees merely because the employer happens to be a public agency.

The fallacy in appellants' argument is that it is purely semantic. To paraphrase Justice Holmes, the contention that ". . . the subject matter . . . is political

is little more than a play upon words." *Nixon* v. *Herndon,* 273 U.S. 536, 540 (1927). The mere fact that public sector unions must deal with the government as the employer in collective bargaining does not make the activities associated with collective bargaining any more "political" in the sense used in *Street* and *Allen* than similar activities of private sector unions in dealing with their employers.

Although the plurality opinion in *Street* dealt with statutory rather than constitutional distinctions, its discussion of the meaning of "political" activities should be helpful, if not persuasive, in defining the term in a constitutional context. There the Court said that the use of an employee's money over his objection:

> "[T]o support candidates for public office, and advance political programs is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified." 367 U.S. at 768.

This distinction between "political" expenditures on the one hand and collective bargaining expenditures on the other was made again in *Allen,* where the Court stated that the remedy to avoid the improper expenditure of compelled funds must provide for ". . . a division of the union's political expenditures from those germane to collective bargaining, since only the former, to the extent made from exacted funds of dissenters, are not authorized . . . ." 373 U.S. at 121. And later the Court stated that ". . . no decree would be proper which

appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' . . . exactions in support of political activities." *Id.* at 122. Thus, whether or not this Court would find that compelled fees may constitutionally be used for "political" purposes, it is clear that expenditures for collective bargaining have been considered separate and distinct from "political" expenditures and the former type of expenditure has been held in *Hanson, Street* and *Allen* not to violate the First Amendment rights of dissenting fee payers.

Mr. Justice Douglas concurred in *Street* with an analysis of the effect of a union's use of compelled funds on First Amendment rights. Assuming that the Court might find that the use of such funds for certain purposes does infringe upon such rights, his opinion is helpful in determining what expenditures would be considered impermissible under a constitutional standard. First, Justice Douglas reiterated the *Hanson* holding that "it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost [footnote omitted]." 367 U.S. at 776. Then he stated that those compelled to pay funds to a union "should not be forced to surrender any matters of conscience, belief, or expression." *Id.* Emphasizing this distinction, Justice Douglas stated:

> "The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action." *Id.* at 777.

Justice Douglas further cited the use of union funds for the purpose of influencing electoral politics as subordinating the individual's First Amendment rights to the views of the majority. Thus, he drew a distinction between permissible expenditures for collective bargaining and impermissible expenditures which go to matters of conscience and belief or to the political electoral process. Even Justice Black, who would have struck down Section 2, Eleventh of the Railway Labor Act as violating First Amendment rights because, in his view, it required an employee to pay for the promotion by the union of economic, scientific, political or religious doctrines or views he might oppose, agreed that Congress constitutionally could authorize the requirement that a worker pay dues to a union for the purpose of defraying the cost of acting as his bargaining agent. 367 U.S. at 791.

The fact that a public employee union must bargain with government as the employer does not make such bargaining "political" activity which goes to matters of conscience and belief. Rather, bargaining is the "cause which justified bringing the group together" (*Street,* 367 U.S. at 740, 778, Douglas, J., concurring). The cause which has led to the formation and growth of public employee unions is identical to that which prompted the organization of private sector workers—the employees' desire to secure improvements in wages, hours and other terms and conditions of employment. To that end, unions, both private and public, negotiate

and administer collective agreements. The compelled financing of the collective bargaining activities of a public employee union does not interfere with the "conscience and beliefs" of the employees it represents any more than does the exaction of fees to support the bargaining activities of a private sector union.

(2) *The Fact That Public Employee Unions Are Involved In The Political Process Does Not Distinguish Them from Private Sector Unions.*

Appellants argue that wholly apart from their involvement with government at the bargaining table, public employee unions are basically "political" in nature, and therefore compelled financial support for such unions violates the constitutional rights of those from whom the fees are exacted. This contention, apparently based on the supposition that public employee unions deal extensively with government in contexts other than collective bargaining, is no different from that made in the private sector cases which have upheld the exaction of financial support:

> "The Nebraska Supreme Court in *Hanson,* upholding the employees' contention that the union shop could not constitutionally be enforced against them, stated that the union shop 'improperly burdens their right to work and infringes upon their freedoms. This is particularly true as to the latter because it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice.' *Hanson* v. *Union Pac. R. Co.,* 160 Neb. 669, 697, 71 N.W.2d 526, 546. *That statement was made in the context of the argument that compelling an individual to become a member of an organization with political aspects is an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process." International Association of Machinists* v. *Street,* 367 U.S. at 747. (Emphasis added).

The court rejected this argument in both *Hanson* and *Street.*

There is no question that public employee unions do engage to a considerable extent in the "political" process—if by that term we mean the interaction of citizens with government. But such activities do not differ significantly in either type or amount from the activities of private sector unions. The Court in *Street* was well aware of these activities. As Justices Frankfurter and Harlan stated in their dissent:

> "The statutory provision [of the Railway Labor Act] cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular—activity indissolubly relating to the immediate economic and social concerns that are the *raison d'etre* of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade-union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers and leave out their so-called political activities and expenditures for them would be sheer mutilation." 367 U.S. at 800.

As counsel for one of the largest private sector unions informed this Court:

> "For a hundred years, if Your Honors please, we have been engaged in political activity. Our own union Constitution, from its first day, urges it. One cannot draw a line between bargaining and politics. Bargaining is supplemented by legislation and legislation is supplemented by bargaining.
>
> "Now, you cannot split legislation from bargaining. At the bargaining table we get Blue Cross and Blue Shield and at the Congress we ask for national health insurance to supplement it.
>
> "In Congress we get unemployment compensation, and at the bargaining table we supplement it with supplementary unemployment payment. This is as one what you have here, the bargaining and the legislative process."

Statements of counsel for UAW in *United States* v. *International United Auto, etc., Workers,* 352 U.S. 567 (1957), at pp. 82-84 of official transcript of proceedings before the Supreme Court (Dec. 4, 1956) as quoted in Lane, "Analysis of Federal Law Governing Political Expenditures by Labor Unions," 9 *Labor Law Journal* 725 (1958).

Except for the interesting but irrelevant fact that public employee unions bargain with public employers, the purposes, functions and activities of public employee unions are virtually identical to those of their brother and sister unions representing private employees. All may engage to an extent in political, electoral, or ideological activity which may be offensive to an individual employee's conscience and beliefs. But this possibility does not render invalid a requirement that those who benefit from the collective bargaining activities of their exclusive representative pay their

fair share of the costs of those activities.[18] The Court has fashioned relief in the private sector for employees who object to those expenditures which may go beyond legitimate collective bargaining-related functions; the same form of relief is available in the public sector. The essential point is that if the collective bargaining activities of private sector unions may be financed by means of union security provisions without offending the Constitution, the similar activities of public sector unions may, consistently with the Constitution, also be funded by compelling fees from all unit employees.

II. THE COURT BELOW IN ESSENCE SEVERED THE APPLICATION OF THE MICHIGAN STATUTE WHICH IT DEEMED UNCONSTITUTIONAL, AND THAT ACTION IS NOT SUBJECT TO REVIEW BY THIS COURT.

The Michigan Court of Appeals decided that the Michigan statute could not be construed—as this Court had construed the Railway Labor Act in *Street*—to deny the union the power, over an employee's objection, to use his money to support political causes which he opposes. The Michigan Court of Appeals concluded that because the statute permitted use of exacted fees for "political" causes, as that term was used in *Street,* the statute "could violate plaintiffs' First and Fourteenth Amendment rights." 60 Mich. App. at 100.

After concluding that the statute was susceptible to an unconstitutional application, the Court, in essence, severed that application from its constitutional aspect

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[18] As suggested by the Court in *Allen,* (373 U.S. at 122-123), the Detroit Federation of Teachers, appellee herein, has adopted "an internal union remedy" available to those dissenting from union expenditures asserted to be political in nature or not germane to collective bargaining. *Amicus* NEA has adopted a similar procedure.

of permitting expenditures to support collective bargaining activities. The Court accomplished this by providing that a union, once notified of an employee's objection to the "political" expenditures of the union, is required to refund that portion of the employee's money expended by the union for such causes. The Court thus provided a way in which the unconstitutional application of the statute could be severed while insuring that its fundamental purposes—*i.e.*, the support of collective bargaining and the furtherance of labor stability—are carried out.

Michigan law provides as follows:

> "If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by this court to be inoperable, and to this end acts are declared to be severable." MCLA 8.5, MSA 2.216.

The Michigan Court of Appeals, in effect, followed the dictates of this Michigan statute and upheld those aspects of the agency fee law which it found could be applied without infringing upon any constitutional rights.

While a severability statute is not essential to severability,[19] the existence of such a statute "creates a presumption that, eliminating invalid parts, the legis-

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[19] *United States* v. *Jackson*, 390 U.S. 570, 585, n.27 (1968). *See also Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971); *Welsh* v. *United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring).

lature would have been satisfied with what remained. . . ." *Welsh* v. *United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 235 (1932). And, at least where a severability statute exists, the concept has been used to expend the scope of a law in order to cure its defects as an alternative to voiding the offending provision.

For example, in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), this Court determined that application of a sterilization statute to persons habitually convicted of certain types of crimes but not to others violated the equal protection clause of the Fourteenth Amendment. The Court noted that the constitutional problem might be resolved either by contracting the class of criminals who might be sterilized or by enlarging that class. In *Welsh*, Justice Harlan characterized the Court's decision on this matter as follows:

> "In *Skinner* the Court impliedly recognized the mandate of flexibility to repair a defective statute —even by extension—conferred by a broad severability clause." 398 U.S. at 365, n.17.

He noted:

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239. . . ." 398 U.S. at 361[footnoted omitted].

Justice Harlan continued that

> "While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability." 398 U.S. at 364 [referring to 50 U.S.C. App. 456(j), worded similarly to the Michigan severability law quoted above].

See also Moritz v. *Commissioner of Internal Revenue,* 469 F.2d 466, 470 (10th Cir. 1972).

The intent of the Michigan legislature, as expressly stated in Section (2) of the agency shop law, was to ensure "the stability and effectiveness of labor relations in the public sector. . . ." The severing out of the aspect of the law which would have permitted the expenditure of money for "political" causes over the objection of dissenters leaves the primary focus of the statute intact. *Cf. United States* v. *Jackson,* 390 U.S. at 586. Clearly, the Michigan legislature's intent was to permit exacted fees to be used to help finance the collective bargaining activities of exclusive representatives. It can confidently be assumed that the legislature would not have discarded the entire statute merely because unions would not be able to apply the money of objecting fee payers to the "political" expenditures of the organization. The action of the Michigan Court of Appeals which in effect severed the application of the statute which it deemed unconstitutional was clearly in accord with the basic legislative intent embodied in its passage.

This action by the court below was a determination of state law controlling upon this Court. As stated by

Mr. Justice Brandeis in *Dorchy* v. *State of Kansas,* 264 U.S. 286, 290 (1924):

> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. *Its decision as to the severability of a provision is conclusive upon this Court.* Gatewood v. North Carolina, 203 U.S. 531, 543, . . . Guinn v. United States, 238 U.S. 347, 366, . . . Schneider Granite Co. v. Gast Realty Co., 245 U.S. 288, 290." (emphasis added)

See *Bell* v. *State of Maryland,* 378 U.S. 226, 240-241 (1964); *Skinner* v. *Oklahoma,* 316 U.S. at 543.[20]

CONCLUSION

For the foregoing reasons, *amicus* urges that the appeal be dismissed for want of a substantial federal question. In the alternative, the judgment of the court below should be affirmed.

Respectfully submitted,

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[20] The decision of the court below provided appellants with effective relief by declaring that the appellee union could not use fees exacted from appellants for "political" causes over their objection.